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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ARVELL JAMES IRVING,	1:10-cv-00905-GBC (PC)
Plaintiff,	ORDER TO SHOW CAUSE REGARDING
v.	ADMINISTRATIVE EXHAUSTION OF
California Department of Corrections, et	CLAIM 2
al.,	(ECF No. 12)
Defendants.	THIRTY DAY DEADLINE

Plaintiff Arvell James Irving ("Plaintiff") is a state prisoner proceeding pro se and in forma pauperis in this civil rights action filed pursuant to 42 U.S.C. § 1983. Plaintiff filed this action on May 20, 2010 and consented to Magistrate Judge jurisdiction on May 28, 2010. (ECF Nos. 1 & 4.) Plaintiff then filed a First Amended Complaint on August 24, 2010. (ECF No. 12.)

On page two of the form complaint, Plaintiff states that there is an inmate grievance procedure available at his institution. (ECF No. 12, Pl.'s 1st Am. Compl., p. 2). Plaintiff goes on to state that he completed the grievance procedure for Claim 1, but did not file a grievance at all for Claim 2. (Id.) Plaintiff states that Claim 2 deals with an accident that caused injury to his back on March 30, 2010. (Id.) In explanation for him not complying with the grievance procedure, Plaintiff states that he has not received an MRI or X-ray, so he is filing Claim 2 in this action under Wright v. California, 122 Cal.App.4th 659 (2004). (Id.)

Pursuant to the Prison Litigation Reform Act of 1995, "[n]o action shall be brought

1 with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a
2 prisoner confined in any jail, prison, or other correctional facility until such administrative
3 remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). Prisoners are required
4 to exhaust the available administrative remedies prior to filing suit. Jones v. Bock, 127
5 S.Ct. 910, 918-19 (2007); McKinney v. Carey, 311 F.3d 1198, 1199-1201 (9th Cir. 2002).
6 The Court must dismiss a case without prejudice even when there is exhaustion while the
7 suit is pending. Lira v. Herrera, 427 F.3d 1164, 1170 (9th Cir. 2005).

8 Exhaustion is required regardless of the relief sought by the prisoner. Booth v.
9 Churner, 532 U.S. 731, 741 (2001). A prisoner must “must use all steps the prison holds
10 out, enabling the prison to reach the merits of the issue.” Griffin v. Arpaio, 557 F.3d 1117,
11 1119 (9th Cir. 2009); see also Brown v. Valoff, 422 F.3d 926, 935 (9th Cir. 2005). A
12 prisoner’s concession to non-exhaustion is valid grounds for dismissal so long as no
13 exception to exhaustion applies. 42 U.S.C. § 1997e(a); Wyatt v. Terhune, 315 F.3d 1108,
14 1120 (9th Cir. 2003).

15 The California Department of Corrections and Rehabilitation has an administrative
16 grievance system for prisoner complaints. Cal. Code Regs., tit. 15 § 3084.1 (2008). The
17 process is initiated by submitting a CDC Form 602. Id. at § 3084.2(a). Four levels of
18 appeal are involved, including the informal level, first formal level, second formal level, and
19 third formal level, also known as the “Director’s Level.” Id. at § 3084.5. Appeals must be
20 submitted within fifteen working days of the event being appealed, and the process is
21 initiated by submission of the appeal to the informal level, or in some circumstances, the
22 first formal level. Id. at §§ 3084.5, 3084.6(c).

23 In order to satisfy section 1997e(a), California state prisoners are required to use
24 the available process to exhaust their claims prior to filing suit. Woodford v. Ngo, 548 U.S.
25 81, 85 (2006); McKinney, 311 F.3d at 1199-1201. “[E]xhaustion is mandatory under the
26 PLRA and . . . unexhausted claims cannot be brought in court.” Jones, 127 S.Ct. at 918-19
27 (citing Porter, 435 U.S. at 524). “All ‘available’ remedies must now be exhausted; those
28 remedies need not meet federal standards, nor must they be ‘plain, speedy, and effective.’”

1 Porter, 534 U.S. at 524 (quoting Booth, 532 U.S. at 739 fn. 5).

2 Plaintiff states that he did not follow the grievance procedure for Claim 2 and relies
3 on Wright v. California, 122 Cal.App.4th 659 (2004). In Wright, the prisoner alleged
4 medical malpractice and violations of his Eighth Amendment rights. The prisoner argued
5 that he had substantially complied with the grievance procedure (completing up to level
6 two) and used the Defendant's extreme delay as an excuse for not completing level three.
7 The Court disagreed, finding that "the [Defendant's] delay does not excuse [the prisoner's]
8 failure to exhaust his available administrative remedies" and noting that the correct remedy
9 for an unreasonable delay is not a suit for damages, but a writ of mandate. Id. at 667.
10 Plaintiff refers to the footnote included by the Wright Court which states that a defendant
11 must complete the third level review within a reasonable period. Id. at 668, fn. 2.

12 Plaintiff makes no statements as to the relevance of this case to his situation.
13 Unlike the prisoner in Wright, Plaintiff states that he did not even attempt to comply with
14 the grievance procedure for Claim 2. Plaintiff appears to be blaming his failure to comply
15 on the fact that he had not received an MRI or an x-ray, which he refers to as an
16 "EXTREME DELAY". This alleged delay has no correlation with the delay referred to in
17 Wright. In Wright, the prisoner had completed the second level of review and submitted
18 his appeal to the third level, but had not received a response before he filed his complaint.
19 This is not the case here. Plaintiff states that he did not file any grievance having to do
20 with his injury. Thus, he has not complied with the grievance procedure as required.

21 Because Plaintiff has not completed the grievance process, the Court HEREBY
22 ORDERS that:

- 23 1. Plaintiff SHALL SHOW CAUSE why Claim 2 should not be dismissed
24 without prejudice for failure to exhaust administrative remedies within
25 thirty (30) days of the date of service of this order.

26 IT IS SO ORDERED.

27 Dated: May 20, 2011

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UNITED STATES MAGISTRATE JUDGE